Pentagon Papers Trial: A Major Test of First Amendment

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LOS ANGELES, July 25—A major test of the Government's authority over information and of the public's access to it will begin to unfold later this week when the Pentagon papers trial begins here.

The spectacular nature of the Pentagon papers themselves, plus the charisma of their alleged purveyor, Daniel Ellsberg, have tended to obscure the crucial First Amendment implications of the case. But some lawyers are saying that if Dr. Ellsberg and his co-defendant, Anthony J. Russo Jr., are convicted it will set legal precedents that could give the Government a degree of control over information that has never before existed.

News Analysis

These lawyers say that the issue is not just that this is the first time the Government has attempted to imprison someone for "leaking" Government information to the public.

More important, they say, is that the Justice Department is seeking to invoke principles of criminal law against the defendants that, if upheld by courts, would permit the Government to prosecute others who make public governmental information without official permission. Such a development would give public officials unprecedented power to conceal embarrassing facts from the public.

Implications of Indictment

Dr. Ellsberg and Mr. Russo are accused of releasing the top secret study of the origins of the Vietnam war. In its indictment, the Government implied that it is a crime to release information that is damaging to the national defense, to plot to make public any material that has been given a government secrecy classification and to "steal" and distribute government writings without official permission.

These implications arise out of the indictment's three basic charges — espionage, conspiracy to release classified information and misuse of government property.

How to keep governmental secrets has always posed a profound dilemma for a nation that wrote into its Constitution's First Amendment that Congress shall pass no laws infringing freedom of speech or of the press.

Several unsuccessful efforts have been made in Congress to pass an official secrets act making it a crime to disclose or publish any matter classified as secret.

Aside from the questionable validity of any such law under the First Amendment, Congress has always been put off by the potential that such a law would offer for the Government to hide its warts by stamping "top secret" on embarrassing information.

Broad Disclosure Ban

The only concession Congress has made is in the Espionage Act, which outlaws two specific types of disclosures—the release of secret codes and the disclosure by a Government employe of information to a foreign agent. Neither is alleged by the indictment in the Pentagon papers case.

The Espionage Act also contains a broad prohibition against the disclosure of any "information relating to the national defense" by one who "has reason to believe [it] could be used to the injury of the United States or to the advantage of any foreign nation."

Dr. Ellsberg and Mr. Russo are the first persons who did not pass information to foreign agents ever to be charged with this provision of the espionage law.

It is the two additional charges that have raised the most serious concern among constitutional lawyers. Neither has ever made by the Government in any previous case.

The first is that the defendants conspired to "defraud the United States" by "impairing, obstructing, and defeating its lawful governmental function of controlling the dissemination of classified government studies, reports, memoranda and communications."

If upheld, this would put the Justice Department in a position to invoke the general Federal statute against illegal conspiracies against government officials and newsmen who work together to publicize classified matter — although Congress has refused to make it a crime acturally to release such material.

Theft by Borrowing

In the past, the secrecy system has often been abused to the point that the military's purchases of peanut butter and paint have been known to be classified confidential. Considering this, some layers have been known to be classified confidential. Considering this, some layers have said that the conspiracy charge could set a precedent that might be used to smother public knowledge of such matters as cost-overruns on defense contracts, failures of costly aircraft and blunders by intelligence agencies.

Yet the most far-reaching charge by the Government, in the view of some constitutional scholars, is the effort to prosecute Dr. Ellsberg and Mr. Russo under the general Federal statute against stealing, embezzling and converting (using for private purposes) government property.

Dr. Ellsberg apparently never intended to keep the Government's copy of the 47-volume study, but rather Xeroxed a copy of his own and returned the original. Thus the Government's charge appears to be that it owned the information contained in the volumes, and that Dr. Ellsberg stole it, or criminally converted it to his own use, when he copied it.

Prof. Melville B. Nimmer of the University of California at Los Angeles Law School, a leading authority on copyright laws and the First Amendment, says that if this charge sticks, "the Government will have an official secrets act which covers not only official secrets but any and all information the Government has."

His point is that if the Government can own and control information — as distinct from the paper upon which it is written—and if persons can be jailed for Xeroxing it without permission, the Government can suppress embarrassing reports or studies without regard to any effect upon the national defense.

Because the defendants are charged with acts taken months before The New York Times first published material from the Pentagon papers, the Government has insisted that no "so-called right to know" is involved.

David R. Nissen, the Government's special prosecutor, filed court papers several weeks ago asking the judge to take a number of steps to insulate the jury from published statements by the defense.

Mr. Nissen said these statements created "the false impression that the case involves or relates to newspaper publication of the stolen documents in the summer of 1971, freedom of the press, and the public's right to know."

CHARGES UNPROVED, HOSPITALS UNIT SAYS

The Health and Hospitals Corporation said yesterday that there was no documented proof of the charges by Coney Island Hospital officials that heart patients had died needlessly because the hospital could not hire additional nurses to staff a newly completed addition to a coronary-care unit.

Joseph B. Mann Jr., senior vice president of operations for the corporation, said that because of the lack of funds city hospitals were permitted only to maintain their physician and nursing staffs up to the level of Nov. 15, 1971. Since the corporation was formed in 1970, Coney Island registered a gain of 39 per cent in its nursing staff, he said.

Frank Hays, the executive director of Coney Island Hospital, said the hospital's complaint of not being permitted to hire additional nurses was directed against the city and not the corporation. He said the hospital would join the corporation in its fight to get mandated funds for health care from the city.

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